No. 92

In the Supreme Court of the United States

OCTOBER TERM, 1948

H. P. HOOD & SONS, INC., PETITIONER

v.

C. CHESTER DuMOND, COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE COUNTY OF ALBANY, STATE OF NEW YORK

RESPONDENT COMMISSIONER'S BRIEF

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Opinions Below

The court of original jurisdiction was the Special Term of the New York Supreme Court which referred the proceeding to the Appellate Division for review and determination pursuant to the 6th and 7th subdivisions of New York Civil Practice Act section 1296 (R. 2, 6, 7). An unpublished opinion was written on a motion by the commissioner to strike from the petition certain language in the nature of mandamus (R. 95, 98). The Appellate Division handed down two concurring opinions unanimously confirming the commissioner's order (271 App. Div. 394; 66 N. Y. S. 2d. 732; R. 101, 102). The Court of Appeals' opinion is found in 297 N. Y. 209; 78 N. E. 2d. 476; (R. 111).

Statement

The petitioner is a huge corporate milk dealer (R. 87). With twenty-six country plants, not including its secondary market facilities, its operates throughout the New England states where it has several outlets for its fluid milk (R. 28). It operates three milk receiving stations in New York State (R. 88, 23). Having an option to purchase a plant at Greenwich, New York, formerly operated by the Greenwich and Easton Farm Products Company, it asked the respondent "in compliance with your Orders and Regulations" to extend the New York milk dealer's license it had held for many years (R. 86, Ex. 4, R. 23). An administrative hearing was held on this extension request (R. 21). Petitioner's existing license was renewed, but its extension request was denied (R. 8-9). Without protesting or surrendering the license granted by respondent, petitioner at once contested respondent's refusal to extend it (R. 3). The court review was in the nature of certiorari (N. Y. Civil Practice Act, Article 78) and thus below the weight of the proof supporting the administrative determination was the issue (R. 7).—The petition does not allege a single constitutional ground (R. 6-7), nor was any such contest raised in the pleadings by joinder of issue (R. 14, 15, 16).

After the proceeding had been argued in the Appellate Division petitioner asked leave of the Court of Appeals to appeal to that bench on the sole constitutional ground that the respondent's order violated the commerce clause of the federal constitution (R. 111). Despite the fact that the parties to the administrative hearing do not seem to have comprehended such an issue before the commissioner and notwithstanding the silence on any such point in the pleadings, the Court of Appeals heard petitioner's argument (R. 112) and decided against it (R. 107).

For the first time the Boston Marketing Order was mentioned in the Court of Appeals as an alleged conflict with New York's licensing activity (R. 114-115).

As the legal issue has developed in the course of appeal, the respondent has been forced to meet a constitutional argument based upon an administrative record which in our opinion falls too far short of the minimum requirement. If in attempting to supply the record's deficiencies we draw (as petitioner has done) upon outside sources, our privilege in that respect will be understandable.

Question Presented

We do not see the question as put by petitioner's brief (p. 2). It is not whether the commissioner's order denying petitioner "a license to purchase and ship milk in interstate commerce" violates the Commerce Clause. Petitioner is already licensed to purchase and ship milk anywhere without any restriction or condition imposed (R. 20, 85, 22). The questions, if any, must be:

a. Whether the commissioner's order refusing petitioner permission to equip an *additional* New York plant at which to receive and handle milk from producers on the ground it "would tend to a destructive competition in a market already adequately served, and would not be in the public interest," unreasonably burdens interstate commerce, and if not, then

b. Whether the commissioner's order illegally conflicts with Federal Milk Order No. 4.

Argument Summary

1. The commissioner's order does not unduly burden, unconstitutionally obstruct nor unreasonably restrict in-

terstate commerce. Despite the fact petitioner holds an unlimited license from the commissioner it claims the "quantity" of its commerce is restricted. There is no proof in this record to support such a claim. In its Appellate Division brief[1] petitioner frankly said that its plant at Eagle Bridge and Salem have the capacity to handle additional milk. In answer to an inquiry from the bench in the Court of Appeals, petitioner's counsel informed the court that petitioner was shipping out of New York unhindered all its milk purchases. Petitioner does not deny this as a fact, but now urges in answer that there may be a time when present facilities would become inadequate and therefore it is possible that the order, the effect of which expired with the license year on March 31, 1947 (R. 13) may limit petitioner's unknown future activity. Well of course there must be a time when the argument of remote contingencies must end. A respondent should not be unfairly prejudiced by the necessity of meeting after-thoughts once the hearing record is closed. It has been said that this court does not deal with theoretical disputes but with concrete and specific issues, and that "Constitutional questions are not to be dealt with abstractly." (*Allen-Bradley Local v. Board*, 315 U. S. 740, 746).

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[1] "No restrictions or conditions are imposed upon the license. The application upon which it was granted lists (Exhibit 5), on page 2 thereof, the two plants already mentioned, operated by petitioner, and the plant at Norfolk, New York, also operated by petitioner, as the plants or stations owned or operated by it where it receives milk from producers. Petitioner has recently enlarged the plant at Eagle Bridge so that it has a contemplated capacity of 40,000 pounds to 60,000 pounds per hour, or approximately 500 cans per hour. The producers at Eagle Bridge deliver between 1,000 and 2,000 cans of milk during the year, so it is apparent that the Eagle Bridge plant of petitioner could handle additional milk and it is reasonable to assume that the plant at Salem could do likewise. In any event, there is nothing to prevent the petitioner from enlarging its present plants and going out to seek as many producers as it needs to satisfy its requirements, without opening a plant at Greenwich."

2. New York by its milk dealer licensing cooperates with federal marketing control, and Agriculture and Markets Law section 258-c coincides with and is supplemental to the Agricultural Marketing Agreement Act by stabilizing production markets so as to support federal order pricing. (Compare the declaration of policy found in sections 258-k and 258-n (Appendix, pp. 24-25) with the declaration of policy and cooperation found in the Agricultural Marketing Agreement Act as recited in 7 U. S. C. sections 602 and 610 (i) (Appendix pp. 25-26)). Later we will factually demonstrate how the cooperation has actually been worked in practice. Where such cooperation is shown, this court has been reluctant to strike down state action, and such effect as the state regulation may have upon interstate commerce is incidental and not forbidden. In short there is no conflict, and petitioner's complaint is not really against solitary state action but rather against cooperative federal-state control for both New York City and Boston.

3. Petitioner is estopped from attacking the commissioner's order. By the same order, it received license and a valuable property right. While availing itself of its benefits, it cannot without protesting or surrendering its license, constitutionally attack that part of the order which it considers a future burden. We have consistently asserted estoppel. Our answer contains a specific affirmative defense (R. 16). We asserted it in the Court of Appeals under a point heading which said "petitioner's position is constitutionally untenable." While last in our argument here, we again urge it as of primary significance.

ARGUMENT

I

The Commissioner's order does not unduly burden, unconstitutionally obstruct, nor unreasonably restrict interstate commerce.

While petitioner's brief insists that a license has been denied permitting it to make interstate purchases of milk, not the slightest proof to support that claim can be found in this record. On the contrary, the proof is (1) that petitioner has been licensed without condition or limitation (R. 22, 85) and (2) that its prior license was renewed (R. 9, 20).

The proof also shows that under its license petitioner expanded its facilities in New York by converting Eagle Bridge into a so-called "new plant" with a tremendously enlarged capacity[2] of 40,000 to 60,000 pounds per hour (R. 31). Sixty thousand pounds per hour means about 706 forty-quart cans per hour. There is storage for 600 cans, and a separate storage tank of 100 can capacity for skim (R. 31, fol. 49). Petitioner's witness testified that the Eagle Bridge plant had not been bothered by lack of storage facilities and the new equipment would "step up the capacity" (R. 31). Before the change, the Eagle Bridge plant had a capacity of 35,000 pounds per hour with a day's operation beginning at 7:00 o'clock in the morning and ending at 1:30 o'clock in the afternoon (R. 32).

Now the most the petitioner could anticipate at Greenwich is receipt of 300 cans which it would take out of Eagle Bridge and Salem and divert to Greenwich. At best 500

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[2] Capacity means handling, cooling and loading tank cars (R. 31).

cans, "probably", in the flush season was conjectured (R. 42). The reason given for this change was that it would convenience 80 to 100 producers in the vicinity of Greenwich who would save five or six miles on their hauling costs (R. 25, 41, 42). Even if it were pertinent to the constitutional point, we cannot tell exactly what the saving in hauling cost would be, if any, (hauling is customarily arranged between producer and trucker[3] and often at a flat rate regardless of distance), but this proof does demonstrate that petitioner's claim the commissioner has barred interstate purchases at Greenwich is considerably adulterated since that milk is and has been moving interstate without interference from respondent. In any event these Hood producers are not parties to this proceeding; did not appear at the administrative hearing; and do not assert any claim at court.

The real reason for petitioner's extension request is one of convenience to itself. On the hearing petitioner's witness said that in the peak season milk had been rejected by the Boston Health Board "due to the inability of our plant facilities to handle the peak volume before 9 A. M." (R. 25, fol. 40). In the first place that is not a health requirement peculiar to Boston. New York City regulations also require delivery of morning milk to the plant before 9 A. M. (R. 30). If morning's milk is cooled on the farm it may be handled an hour later (R. 25).[4] All milk plants operate under that requirement, but in the next place the inconven-

[3] Petitioner's witness said it ranged from 15 to 20 cents per cwt., but did not testify whether the rate would vary with the mileage (R. 30). Thus, we do not know if there would be any financial saving. The witness talked about mileage saving (R. 42).

[4] Under the health regulations, the producer cools his evening's milk. If he delivers his morning's milk before 9 A. M. he does not need to cool it and the plant does. If he delivers after 9 A. M., he must then cool his morning's milk also.

ience, if any, only lasts during the flush season, a period of about six weeks (R. 29) and most likely in the month of June which is shown as the month of maximum purchases (R. 87, Ex. 5, Item 7; R. 23).

There is nothing in this record from which it can be learned how efficiently petitioner is running its plants. Another dealer with efficient operational methods might not have that problem. A new plant is not necessarily the remedy. Petitioner might have any number of new plants and still have operational problems. The new Eagle Bridge plant with its greatly increased capacity may already have eliminated it because the 25,000 pound per hour capacity increase is about equal to the amount of milk petitioner would divert from Salem and Eagle Bridge to Greenwich. Petitioner's argument is one for convenience. A matter of convenience will not support a constitutional objection.

Petitioner's brief (p. 12) points out that there is no contention here that because the petitioner's business is interstate it is immune from all the requirements of the New York licensing statute. Petitioner wishes to pick and choose its attack saving what it considers of benefit and destroying its annoyances. Petitioner does attack the licensing statute as we shall demonstrate in our next point, and stripped of all legal niceties, licensing by the state is the sole issue in this case.

We think of *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346 as controlling. Said the court (352-353):

> "The respondent maintains a receiving station in Pennsylvania where it conducts the local business of buying milk. At that station the neighboring farmers deliver their milk. The activity affected by the regulation is essentially local in Pennsylvania. Upon the completion of that transaction the respondent engages in conserving and transporting its own property. The

> Commonwealth does not essay to regulate or to restrain the shipment of the respondent's milk into New York or to regulate its sale or the price at which respondent may sell it in New York. If dealers conducting receiving stations in various localities in Pennsylvania were free to ignore the requirements of the statute on the ground that all or a part of the milk they purchase is destined to another state the uniform operation of the statute locally would be crippled and might be impracticable. Only a small fraction of the milk produced by farmers in Pennsylvania is shipped out of the Commonwealth. There is, therefore, a comparatively large field remotely affecting and wholly unrelated to interstate commerce within which the statute operates. These considerations we think justify the conclusion that the effect of the law on interstate commerce is incidental and not forbidden by the Constitution, in the absence of regulation by Congress."

The New York Court of Appeals said that it couldn't tell what proportion petitioner's shipments bear to the whole production to which the licensing statute relates. Failing such a showing, that court considered any interference "incidental only" (R. 114). The interference, if any, is a strained technical one, and not actual. Congress has not attempted to license milk dealers in New York any more than it regulated them by license in Pennsylvania in Eisenberg's day.

II

New York by its milk dealer licensing cooperates with Federal Marketing Control and Agriculture and Markets Law section 258-c coincides with and is supplemental to the Agricultural Marketing Agreement Act by stabilizing production markets so as to support federal order pricing.

The history of state-federal cooperation in milk begins with the strikes and riots of 1933-34. As this court found in

Nebbia v. *New York*, 291 U. S. 502, "unrestricted competition aggravated existing evils, and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (530). The legislature had conducted a complete economic investigation and the "existing evils" were found and reported (*Nebbia*, 516-517). The peculiar instability of the fluid milk industry, it said, called for special methods of control. The first emergency Milk Control Law declared its need,[5] and then and there vested authority in the Milk Control Board "to confer with legally

[5] Chapter 158, New York Laws of 1933, section 300. Legislative finding; statement of policy.

"This article is enacted in the exercise of the police power of the state, and its purposes generally are to protect the public health and public welfare. It is hereby declared that unhealthful, unfair, unjust, destructive, demoralizing and uneconomic trade practices have been and are now carried on in the production, sale and distribution of milk and milk products in this state, whereby the dairy industry in the state and the constant supply of pure milk to inhabitants of the state are imperiled. That such conditions constitute a menace to the health, welfare and reasonable comfort of the inhabitants of the state. That in order to protect the well-being of our citizens and promote the public welfare, and in order to preserve the strength and vigor of the race, the production, transportation, manufacture, storage, distribution and sale of milk in the state of New York is hereby declared to be a business affecting the public health and interest. That the production and distribution of milk is a paramount industry upon which the prosperity of the state in large measure depends. That the present acute economic emergency, being in part the consequence of a severe and increasing disparity between the prices of milk and other commodities, which disparity has largely destroyed the purchasing power of milk producers for industrial products, has broken down the orderly production and marketing of milk and has seriously impaired the agricultural assets supporting the credit structure of the state and its local governmental subdivisions. That the danger to the public health and welfare is immediate and impending, the necessity urgent and such as will not admit of delay in public supervision and control in accord with proper standards of production, sanitation and marketing. The foregoing statement of facts, policy and application of this article are hereby declared as a matter of legislative determination."

constituted authorities of other states and of the United States, with respect to a uniform milk control within the states and/or as between states, and may enter into a compact or compacts for such uniform milk control, subject to such federal approval as may be required by law" (§ 314). The Milk Control Board existed one year only. In 1934 certain features of the law, milk dealer licensing and bonding among them, were incorporated in the permanent Agriculture and Markets Law[6] while the temporary milk pricing program continued to be reenacted yearly until it went out on March 31, 1937.[7] The 1934 Act granted the commissioner —as distinguished from the board—authority to confer with the United States on uniform milk control[8] and in 1937 (when New York price control expired) gave him the present power found in section 258-n.[9] It is distinctly clear, therefore, that the cooperative governmental idea was not a recent happenstance to meet federal action in 1937. It was there from the beginning when one month after New York's 1933 legislation (April 10, 1933) Congress enacted the Agricultural Adjustment Act of May 12, 1933.

Meanwhile in 1934 the commissioner had entered into the trials and tribulations of *Baldwin* v. *Seelig*, 294 U. S. 511 (decided March 4, 1935). But before the pricing program collapsed with the decision in that case, a public hearing had been held at Chancellor's Hall in the State Education Building at Albany, New York,[10] at which Governor Lehman appeared and announced a milk code which had been sub-

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[6] Chapter 126, New York Laws of 1934.
[7] Chapter 876, New York Laws of 1937, #5.
[8] Section 258-p.
[9] Appendix, pps. 24-25.
[10] Hearing No. 18, New York Milk Control Board, January 9, 1934. Appendix, pp. 26-27.

mitted to Washington. The Governor emphasized the need for federal cooperation and said that even then two members of his Agricultural Advisory Committee were in Washington to confer with federal authorities. Said Governor Lehman to the 1200 dairy farmers, representatives of distributors and consumers: "I feel that every effort should be made by you gentlemen to strengthen the hands of your Governor and the hands of your Milk Control Board in the effort to secure Federal cooperation to stabilize, regulate and control the milk industry engaged in interstate commerce within the New York Milk shed." (For complete text see Appendix, p. 27.

Following repeated conferences of state officials at Washington, federal action came in the form of a marketing order for the New York Metropolitan area. (Federal Order 27—State Order 126.) New York's commissioner Holton V. Noyes and secretary H. A. Wallace entered into a compact of joint control on behalf of their respective governments. (Appendix, pp. 30-31).

Meantime Boston Order No. 4, later suspended during litigation, was issued February 7, 1936 pursuant to the Act of May 12, 1933, as amended August 24, 1935. (*H. P. Hood & Sons, Inc.* v. *U. S.*, 307 U. S. 588, 591).

New York dairymen voted by referendum whether they wished federal-state control. A pamphlet issued by the United States Department of Agriculture at the time (Marketing Information Series, DM-6, August, 1938, "New York Milk") contained a paragraph headed "Joint State and Federal Administration" in which the following appears:

> "The program would be administered by a market administrator named by the Secretary of Agriculture and the Commissioner of Agriculture and Markets. The

market administrator would administer both the Federal and the State orders, thus making it possible for the Federal and State Governments to operate jointly."

In another pamphlet issued a month after the New York Order became effective (D. M.-8, October 1938, "The Federal-State Program for the New York Milk Market") the United States Department of Agriculture traced the development of state-federal action.[11]

The Boston *Hood* case and the New York *Rock Royal* case reached this court about the same time and were decided together (June 5, 1939). In the *Rock Royal* case (307 U. S. 533) this court found State-Federal cooperation saying (pp. 548-549):

"The cooperation of the two governments was the culmination of a course of investigation and legislation which had continued over many years. The problem from the standpoint of New York was fully considered and the results set out in the Report of 1933 of the Joint

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[11] "In an effort to meet these conditions, milk producers started a move to invoke the regulatory features of the Rogers-Allen Act, and at the same time requested the help of the Federal Government in regulating the handling of milk that comes into New York from outside the State. They sought a program to establish uniform rules under which handlers would buy their milk from producers both in and out of the State. Such a program, they felt, would overcome the weaknesses of earlier efforts which were confined to milk produced within the State.

"Efforts to develop such a program continued for nearly a year. Through conferences with representatives of producers, consumers, distributors, and representatives of the Agricultural Adjustment Administration and the New York State Department of Agriculture and Markets, a proposed Federal-State program was developed. This proposal was considered at a series of public hearings held in various sections of New York State from May 16 to June 8, 1938. The hearings were conducted jointly by the Secretary of Agriculture and the New York State Commissioner of Agriculture and Markets, and gave producers, consumers, and distributors an opportunity in which to express their views on the proposal."

Legislative Committee to Investigate the Milk Industry. This investigation was followed by the creation of the Milk Control Board with broad powers to regulate the dairy business of the state. This board had power to fix prices to be paid to producers and to be charged to consumers. A later New York act, the Rogers-Allen Act, authorized the state commissioner to cooperate with the federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government to be carried out under joint administration."

At this point in our argument the question naturally arises as to how Agriculture and Markets Law section 258-e ties in with federal marketing orders. Section 258-e came into the statute in 1934 (Chapter 126, *supra*). By it the Legislature intended to limit the grant of license and license extension (*Matter of Elite Dairy Products* v. *Ten Eyck*, 271 N. Y. 488, 494). It is not a program of "freezing in"[12] established dealers as petitioner's brief suggests. It is designed to stabilize the production area by controlling tendencies to destructive competition among dealers fighting for sources of supply. It maintains a fair division among producers of the marketing outlets. The commissioner knows from bitter experience what unlicensed, uncontrolled milk plant competition does to the farmer and his "purchasing power", to use the language of the Agricultural Marketing Agreement Act.[13] A sales market without a dependable source of supply has nothing to sell.

Back in the production area the milk plant's continuance is dependent on adequate volume. If its intake goes below a certain point, it runs at a loss. Volume is the key to its

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[12] Its constitutionality was challenged on that ground. It is not a prohibition against new licenses or new license extensions. See *Matter of Elite Dairy Products* v. *Ten Eyck*, 271 N. Y. 188 at 192-193.

[13] Section 1, Act of 1937 (c. 296, 50 Stat. 246) 7 U. S. C. § 601.

efficiency. The tendency is for cost per hundredweight to decrease as volume of milk increases.[14]

Hood's Greenwich plant would start with an 800 can capacity (R. 28). Its witness frankly stated it would "expand its operations in the vicinity of Greenwich" (R. 27). Only 300 cans would be diverted from Salem to Eagle Bridge (R. 25). Where would the additional milk come from to make up the balance in Greenwich and supply the deficiency caused in Salem and Eagle Bridge by the diversion. It could only come from neighboring plants—

[14]

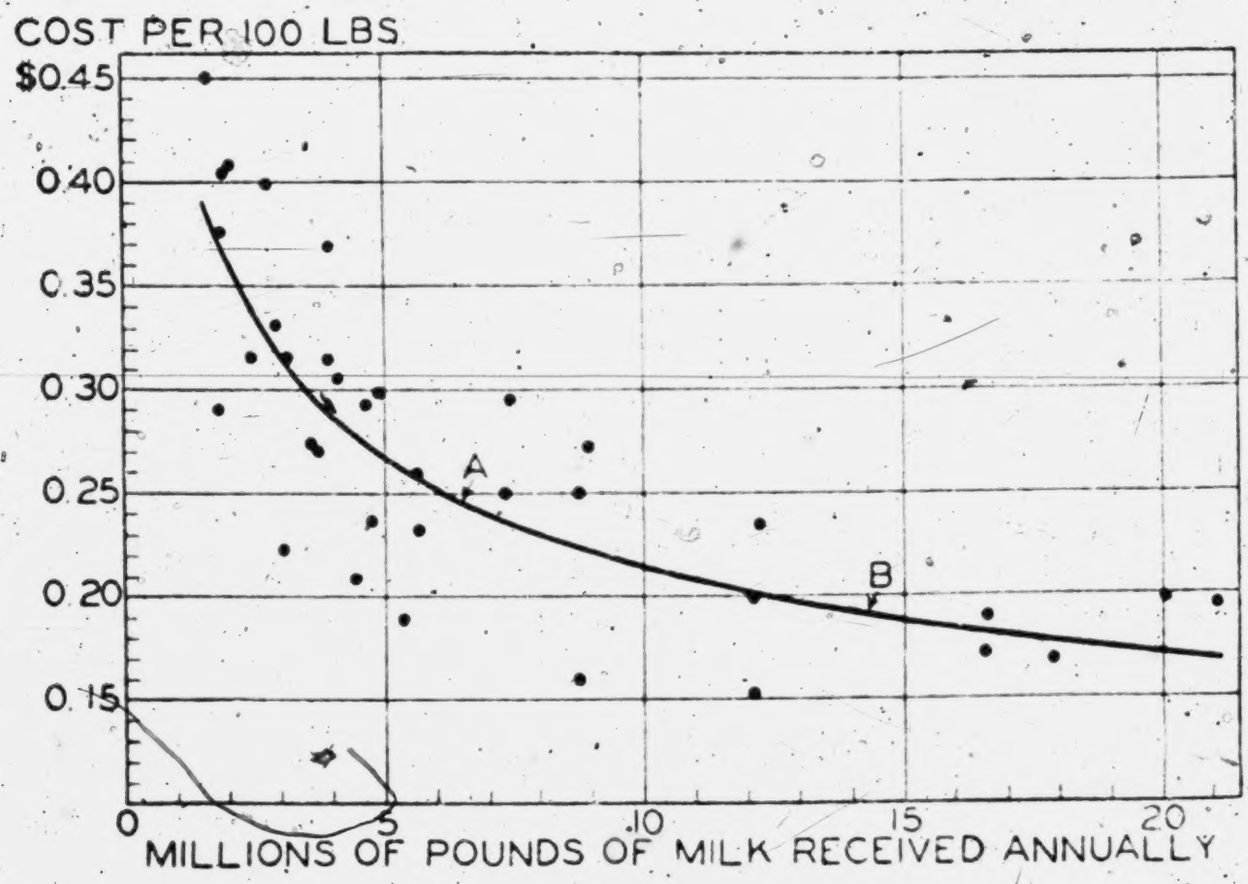

FIGURE 15. RELATION OF VOLUME OF MILK HANDLED TO OPERATING COST PER 100 POUNDS, 38 RAW-MILK PLANTS

(Tucker, C. K. Costs of handling fluid milk and cream in country plants. Cornell Univ. Agr Exp. Sta. Bul 473. 1929)

The position of each dot shows the volume of milk received during the year and the cost of operation per 100 pounds in one plant. The curved line indicates the tendency for cost per hundredweight to decrease as the volume of milk increases. Any point on the curved line represents the approximate average cost of handling 100 pounds of milk in plants of the given volume. Point A represents the volume and cost for all plants in the area; point B represents the volume and cost after eliminating the non-essential plants

[14] From Cornell University Bulletin 486 entitled: "An Economic Study of the Collection of Milk at Country Plants in New York." Page 34.

from plants approved for the federal New York Order at Fort Edward, Granville and Buskirk, New York (R. 44-45). As for the local market at Troy—to which petitioner directs special attack—the problem is no different. If Hood raids Fort Edward, Granville, or Buskirk, all nearby, they in turn cannot be expected to stand idly aside and not protect their investment. At the time of hearing they already had unused capacity. The New York Order approved Sheffield Farms' plant at Cambridge,[15] just ten miles from Greenwich, with a 600 can capacity was taking in but 350 cans of milk after thirty years of operation (R. 56). Buskirk was running under capacity (R. 68). The Dairymen's League had closed its plant at Greenwich (R. 49).

The producers, too, are affected by plant changes. The field representative of the Washington and Rensselaer County Cooperative Association at Cambridge, whose producer members deliver to the Buskirk plant, testified on cross-examination by Hood's attorney that his association could not benefit from a new plant at Greenwich. He said theirs was a "particular New York setup"; that his association would not be able to maintain its revenue by delivering some milk to Greenwich and some to Buskirk; and that the present Buskirk arrangement benefited his association's producers because Buskirk is "geographically situated for trucking" (R. 63). Moreover, because of health regulations, a trucker could not carry Hood milk and Gold Medal Farms (Buskirk) milk on the same truck (R. 68). If a truckman loses part of his load he is likely to discontinue the route altogether because "it would not pay him to run it." New York City Health Department regulations do not permit milk inspected for other markets to be on the same truck with milk inspected for New York City consumption (R. 64).

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[15] Market Administrator's Listings of Handlers and Plants.

The manager of the Buskirk plant[16] testified that its capacity was 3,000 cans per day. In the recent shortage he said the plant payroll had been maintained in anticipation of increased volume in the flush period, but if plant volume should be reduced its manufacturing operation would not pay (R. 64). Moreover, health department regulations have a distinctly local application and are issued for special purposes. For example, they may relate to the size of the farmer's milk house depending on the number of cows. While Boston permits premium payments for bacteria count regardless of fat content, New York does not. According to the witness, this would create "a demoralizing competitive situation in our area" (R. 65).

The items enumerated above and many other local situations contribute to the milk industry in New York factors calling for special methods of control.[17] They are situations not licensed by federal order and which because of their number and diversity are beyond the effective reach of Congress. (*California* v. *Thompson*, 313 U. S. 109, 113, 115; *Parker* v. *Brown*, 317 U. S. 341, 362). The commissioner, however, heard about them on the administrative hearing and was cognizant of them when he made his order.

If milk is drawn from the New York order plants, and they in turn draw from plants supplying Troy, or Glens Falls, or Schenectady, the latter plants (the commissioner knows from experience) will retaliate. The whole market is then inflamed and interstate as well as local supply is

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[16] Buskirk is approved under the New York Federal Order (Market Administrator's Listings of Handlers and Plants). The commissioner's records show it is primarily a fluid milk and cream plant, varying according to seasonal demand.

[17] "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control." (Pitcher Report, Legislative Document No. 111, p. 15).

endangered—Boston's as well as New York's since Hood would not be immune from retaliation either. Instead of jealously protecting local markets as petitioner contends, the commissioner's license control protects the interstate outlets. The particular area is a tight one. It is part of the interstate milk shed for which Governor Lehman back in 1934 sought federal cooperation to control. (*supra*, pp. 11-12).

Competing plants are but a few miles from each other (R. 56, 57, 67). Petitioner's brief points out at page 41 that the free flow of milk from one federally controlled market to another should not be interfered with. The commissioner's licensing power does not interfere. It stabilizes by control at the source and thus keeps open the flow of supply. Under special pricing of the State-Federal New York Marketing Order milk produced in New York State may be sold in fluid form in New England markets such as Springfield, Worcester, and Hartford, and in Boston.[18] In other words, the commissioner's plant control pursuant to section 258-c is not an arbitrary and sectional power. It does not discriminate. Petitioner does not allege discrimination. Section 258-c operates with equality toward resident and non-resident plant operators alike.[19] It protects the supply for New England and New Jersey as well as New York.

Petitioner's brief suggests that it is significant the secretary has refused to establish identity of prices under both orders (pp. 42-43). He has found, says the petitioner, "that precise alignment is not feasible, and that milk has

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[18] As Class 1-B in Boston and Class 1-C in markets not under federal order.

[19] See *Dusinberre v. Noyes*, 284 N. Y. 304; 31 N. E. 2d 34; *Dellwood Dairy Co. v. Noyes*, 288 N. Y. 715; 43 N. E. 2d 95; *Application of Coday Farms v. Du Mond*, 269 A. D. 888; 56 N. Y. S. 2d 243.

not been unduly attracted from one area to the other." Section 258-c and the commissioner's control under it are factors in maintaining "orderly marketing" to prevent undue attraction. The commissioner's representatives and the Market Administrator's men work together. (See Appendix, p. 35.) The commissioner as well as the secretary is acquainted with the interstate problem. Both work together and not at cross purposes.

For example, at page 22 of petitioner's brief there appears a table footnote showing the number of New York producers shipping to Boston. "Boston Milk Market Statistics" from which that table is taken shows that in April 1944 Hood's Norfolk, New York plant was taken over and New York milk from there entered the Boston pool, while in August 1946 Clinton County (N. Y.) Dairymen's Association commenced delivering New York milk to Hood at Plattsburg destined for Boston (pps. 38, 39). Therefore, the jump in the number of producers in 1947 includes both those increases and accounts for 466 of the 1090 producers shown in the table. The New York producers delivering to these two plants, together with milk included in the Boston pool in February and March 1947 from an Ogdensburg, New York plant, supplied 49.4 million pounds of milk out of a total of 111.9 pounds of New York milk supplied to the Boston market, all of which went to Hood. (Petitioner's table 41 on same page). For an explanation of these figures see Appendix page 37.

There was absolutely no interference from the commissioner. These were established plants. When, however, a new plant is opened—one not heretofore a part of the market structure—the whole economy is upset and the reperussions which follow tend to disrupt and destroy orderly marketing. Each new milk plant increases produc-

tion costs. In times of scarcity dealers rush in to acquire new plants which in lafer years of surplus they quickly abandon throwing producers out of a market. The commissioner's control under section 258-c is an over-all, long range program calculated to prevent loss to the producer and thus to conserve a continuing supply necessary to the health and welfare of consumers in far away centers of population. While petitioner professes not to contend "that the Federal scheme leaves no room for any state regulation of milk dealers" (petitioner's Brief, p. 40), its attack is upon the heart of licensing control which if successful will destroy all state cooperation in its paramount agricultural industry.[20]

Even though Congress has acted by federal price order, this alone will not nullify section 258-c if the federal action does not occupy the same field, "or is consistent with it". (*Hartford Indemnity Co.* v. *Illinois*, 298 U. S. 155, 158). When collaboration is found "the courts should not find conflict" (*Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209). Repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together. (*Bethlehem Steel Co.* v. *N. Y. State Labor Relations Board*, 330 U. S. 767, 780). Where the state regulation is such as to coincide with congressional policy, it is entitled to be sustained. (*Parker* v. *Brown*, 317 U. S. 341). "Congress may circumscribe its regulation and occupy a limited field." (*Townsend* v. *Yeomans*, 301 U. S. 441, 454). It seems clear that section 258-c was not aimed at interstate commerce and under the particular facts at bar its effect, if any, on petitioner's commerce is far less than instances which this court has held the states are

[20] Section 258, K, Agriculture & Markets Law.

legitimately entitled to pursue. (*So. Carolina Highway Dept.* v. *Barnwell Bros. Inc.*, 303 U. S. 177).

In evaluating petitioner's contention that the commissioner's order obstructs its commerce and conflicts with federal control, it becomes of some significance that rather than conflict we have cooperation and rather than complete invasion of the state function, the federal power extends to milk pricing while the supporting state power remains in the local licensing field. (*Interstate Gas Co.* v. *Federal Power Commission*, 331 U. S. 682, 692). The federal action occupied only that part of the field which this court in *Baldwin* v. *Seelig* had held New York could not reach. The weight of federal regulation reinforced the gap, but had no intention to cut down remaining state power. (*Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507, 517, 519).

III

Petitioner is estopped from attacking the Commissioner's order.

Under its New York license petitioner is guarded by the same section 258-c it now seeks to destroy. It obtained a valuable property right which prevented unlicensed persons from competing with it in business. For years it availed itself of its license benefits and continues to enjoy its license and those benefits while at the same time carrying on court proceedings in the hope of annulling such control as it considers annoying to it. *The order Hood attacks here is the same order which grants it a milk license* (R. 9). [*Booth Fisheries Co.* v. *Industrial Commission*, 271 U. S. 208.]

This is not a case where petitioner just stood by and made no protest. It has done more. It has availed itself of the license's benefits. (*St. Louis Malleable Casting Co.* v. *Prendergast Construction Co.*, 260 U. S. 469.) The decisive test in estoppel seems to be that the litigant seeks some advantage from the statute it attacks other than say a mere right to sue under it. (*Oklahoma* v. *Civil Service Commission*, 330 U. S. 127, 139-140).

Petitioner may argue that it had to submit to jurisdiction because of fear of losing the license it previously had enjoyed. (See *Great Falls Manufacturing Co.* v. *Garland*, 124 U. S. 581, 600). The answer is that the *Seelig* procedure would apply. Hood could have refused license when dissatisfied with the commissioner's order and upon threat of prosecution for trading without one, could then have sought to restrain the enforcement of the state law.[21] The whole matter could have been gone into thoroughly and the facts we have attempted to demonstrate here would have become proof on the record. However, by coming in on an administrative license hearing without warning the commissioner's agents of the possibility of constitutional attack then, nor later by legal pleading, much essential evidence is lacking to respondent's prejudice.

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[21] *Baldwin* v. *Seelig*, 294 U. S. 511, 520.

Conclusion

The congressional regard for continued state power to license milk dealers in New York should be acknowledged. The state-federal cooperation through which licensing and pricing serve the public interest should not be ignored and stricken down. The order and judgment of the Albany County Supreme Court should be affirmed.

Respectfully submitted,

ROBERT G. BLABEY,
Counsel for Respondent.

NATHANIEL L. GOLDSTEIN, Attorney General, and
DONALD L. BRUSH, Department Counsel,
Attorneys for respondent Commissioner of Agriculture and Markets of the State of New York.

November, 1948.

APPENDIX

Agriculture and Markets Law

§ 258-k. *Declaration of policy.* It is hereby declared that the dairy industry is a paramount agricultural industry of this state and the normal processes of producing and marketing milk have become an enterprise of vast economic importance to the state and of vital interest to the consuming public which ought to be safeguarded and protected in the public interest; that it is the policy of this state to promote, foster and encourage the intelligent and orderly marketing of milk through producer owned and controlled cooperative associations; that unfair, unjust and destructive demoralizing trade practices have been and are likely to be carried on in the production, sale, processing and distribution of milk and that it is a matter of public interest and for the public welfare for the state to promote the orderly exchange of commodities and in cooperation with the federal government, in its regulation of interstate commerce, to take such steps as are necessary and advisable to protect the dairy industry and insure an adequate supply of milk for the inhabitants of this state; that for such purpose public interest requires, as necessity therefor has arisen or may arise, the fixing of prices of milk to be paid to producers and associations of producers where there has been or is a disruption of orderly marketing of milk in any marketing area by reason of surpluses or by reason of unfair, unjust or destructive trade practices so that the prices of milk to the producers are or may be below the reasonable costs of production and impair their purchasing power; that in order to make such price fixing effective, it is necessary that the benefits of the fluid market and the burden of, and the expense of, handling of surpluses, be shared equally by all producers of milk for the marketing area and to this end that dealers not handling their proportionate share of the surplus shall as part of the price of their milk make payments to a fund to equalize the prices of milk to producers and to share the cost of handling surplus so as to remove one of the principal causes of price demoralization.

§ 258-n. *Interstate and federal compacts.* The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States

with respect to a uniform milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders; or orders supplementary to those of the federal government; and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders.

Agricultural Marketing Agreement Act of 1937 (c. 296, 50 Stat. 246), 7 U. S. C., sections 602 and 610 (i)

2. *Declaration of policy; establishment of base periods for prices.*

It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current con-

sumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

§ 10 (i) *Cooperation with State authorities; imparting information.*

The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

MILK CONTROL BOARD

Hearing No. 18

A public hearing of the Milk Control Board was held in Chancellors Hall, State Education Building, Albany, N. Y., on Tuesday, January 9, 1934, at 1:00 P. M., for the purpose

of supplementing, altering, revising and/or amending any or all Official Orders heretofore promulgated by it.

Present:

Charles H. Baldwin, Commissioner of Agriculture and Markets, Presiding.

Dr. Thomas Parran, Jr., State Commissioner of Health.

Kenneth F. Fee, Director, Milk Control Board.

Henry S. Manley, Counsel, Department of Agriculture and Markets and Milk Control Board.

H. R. Waugh, Acting Secretary, Milk Control Board.

Also present were approximately 1200 dairy farmers and representatives of distributors, consumers and other interested parties. (Note.—The hearing, originally planned to be held on the first floor of the State Office Building at Albany, had to be changed to Chancellors Hall owing to the large number which attended.)

GOVERNOR LEHMAN:

Mr. Chairman and Friends:

I came over here today because I wanted to say something to you in connection with the milk problem, which I think is of great importance and which I think you all ought to know about, and on which, frankly, if I am to be helpful to you, I need your help.

I am going to speak very briefly, and I am going to ask to be excused immediately upon the completion of my remarks, because unfortunately I have an extremely busy schedule ahead of me at the Capitol and I therefore must return to my office immediately on the completion of my brief talk.

Last autumn various groups in this State and in the other states of the milk shed prepared a Milk Code for submission to Washington. The Code—in the formulation of which I had no part—was submitted to Washington two or three months ago, but no action has as yet been taken on it. Since then, efforts have been made by the Milk Control Boards of this State and of New Jersey to formulate a joint plan to stabilize the industry in the New York milk shed. The plan, according to the two Boards, is intended to serve temporarily the same purpose as the proposed

milk marketing agreement which has been pending for two or three months past in Washington, as I have previously described.

I know that one of the purposes of the hearing today is to discuss the question of the proposed milk marketing agreement. I am not here on behalf of any specific Code. That is a matter that goes beyond my authority. I am here, however, because I am deeply concerned with this situation and with the problems confronting the milk producers of this State.

The Milk Control Law has been effective in many ways. It has, for months, been very helpful to the producers. It has, on the whole, undoubtedly led to increased returns to the producers. I recommended last week to the Legislature, in my Annual Message, a continuation of the functions and the operations of the Milk Control Board, subject to such changes as may be found necessary in view of changed conditions and the prospective decision of the Supreme Court of the United States, which will be handed down very shortly.

It will be my desire as Governor, as well as that of the Milk Board, to help the producers of milk to the utmost of our powers, because we realize and appreciate the great difficulties and hardships with which the producer has been and is still confronted.

Of course in any program, the interests of the consumer should not be unjustly sacrificed. The problem of milk control within this State, however, goes far beyond the bounds of the State itself. We work, in the milk shed, in association with other states. The problems of production control, price control, distribution, etc. in this State are not only affected but, to a very great extent, are actually controlled by the attitude of other states.

The New York milk shed, comprising various states, imposes real interstate problems. I am convinced, from my observations, that the problem of milk control in this State cannot be adequately or in any way promptly and satisfactorily handled unless we have some form of constructive Federal cooperation, which will permit us to handle the problems of the New York milk shed as a whole in a comprehensive and coordinate way.

There's no use in fooling ourselves in these matters. We might just as well, my friends, face an unpleasant situation courageously and look the facts in the face. I feel it my duty to say to you gentlemen that I am deeply apprehensive with regard to the milk situation in this State, unless we can secure Federal cooperation in the working out of the administration of problems of the several states that go to make up the New York milk shed.

That cooperation must come either through the adoption and the enforcement of a Code, or through Federal approval of an interstate compact between the State of New York and the contiguous states of New Jersey and Pennsylvania. If we do not receive that cooperation, I see only increased competition between producers, price-cutting and an almost complete inability of any State in the milk shed to limit production of milk and milk products.

I have felt so deeply concerned about the situation that some time ago I asked Dr. C. E. Ladd, Dean of Cornell University, and Mr. C. R. White of Ionia, both members of the Governor's Agricultural Advisory Committee, to go to Washington and lay the situation before the Federal authorities. They are again in Washington today or tomorrow at my request, and I hope and expect that they will be able to confer with the responsible Federal officials, and I hope to be able to lay the matter even before the Chief Executive of the Nation, President Roosevelt. (Applause.)

I cannot, my friends, over-emphasize the importance to the milk producers of this State of securing Federal cooperation in the promulgation of a sound Milk Code which will embrace all the states of the milk shed. With such cooperation I believe that much can be accomplished, although obviously our problems will still be very great. Without such cooperation, I have no hesitation in saying that I am deeply concerned by the situation which will confront the milk producers and the milk industry generally in this State during the coming months.

I feel that every effort should be made by you gentlemen to strengthen the hands of your Governor and the hands of your Milk Control Board in the effort to secure Federal cooperation to stabilize, regulate and control the milk industry engaged in interstate commerce within the New York milk shed.

As Governor of the State, I pledge myself, with your help, to do everything possible to secure this Federal cooperation, which I consider indispensable for the permanent stabilization of the milk industry in this State.

I do not think I have made my remarks too strong; I do not think I have over-emphasized the situation. It is one that will bear your scrutiny and study, just as it bears the scrutiny and study of the Milk Control Board and the Governor and of anybody who is sincerely interested in the success and prosperity of this, one of our greatest industries of the State.

I want your help in trying to secure this Federal cooperation, and I am confidently counting on receiving it. I thank you.

(Continued applause.)

Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets.

In order that the policies of cooperation embodied in Section 10 (i) of Public Act. No. 10, 73d Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agricultural and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules, or regulations may hereafter be issued.

JOINT PROCEDURE

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers

who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

Uniform Provisions

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

Exchange of Information

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective com-

plementary and concurrent orders and relative to transactions within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10 (i) of Public No. 10, 73d Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

Administrative Agency

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

Finances

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market

administrator, subject to the audit of both Federal and State authorities. Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

Administration

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the

Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

INTERSTATE COOPERATION

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regulation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.

Signed this 26th day of August 1938.

HOLTON V. NOYES,
Commissioner of Agriculture and Markets,
State of New York.

s/ H. A. WALLACE,
Secretary of Agriculture.

ABOVE—OFFICIALS AT THE HEARING LISTENING TO THE TESTIMONY OF HERBERT KLING ON PRICE OF MILK TO GO INTO CHEESE.

From left to right, Herbert Kling, witness for the Bargaining Agency; Kenneth Fee and L. L. Clough from the New York State Division of Milk Control; George Ware, Dairy Branch, U.S.D.A.; Anson Pollard, Assistant Market Administrator; Julius C. Krause, Attorney U.S.D.A.; Edward F. Nuclo, Market Administrator's office; J. B. Rosenbury, Dairy Branch, U.S.D.A. and Frank B. Lent, Attorney representing the combined producer groups consisting of the Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., including as one of its members the Dairymen's League Cooperative Association, Inc., District 50 United Mine Workers of America, Mutual Cooperative of Independent Producers, Inc., and Eastern Milk Producers Cooperative Association, Inc. (From "Metropolitan Milk Producers' News" October 1, 1950)

MILK FROM PLANTS IN NEW YORK STATE INCLUDED IN BOSTON POOL IN 1947

Plant	*Number of Producers*[1]	*Total Weight of Milk*[2]	*Percentage of Total*	*Period included in Boston Pool*[3]
Eagle Bridge	369	36,728,757	32.84	Aug. '37—Dec. '47
Salem	245	25,770,148	23.04	Aug. '37—Apr. '46
				Aug. '46—Dec. '47
Norfolk	173	15,303,402	13.68	Apr. '44—Dec. '47
Plattsburg	293	31,443,035	28.11	Aug. '46—Dec. '47
Ogdensburg	(*)29	2,608,941	2.33*	
	1109	111,854,283	100.00	

[1] This is the average number of producers making *regular* deliveries monthly as shown by reports filed by dealers with the Commissioner of Agriculture and Markets.

[2] From reports filed by dealers with Commissioner of Agriculture and Markets.

[3] From—Boston Milk Market Statistics August 1937—December 1947—Page 34 referred to at Page 22 of petitioner's brief.

(*) Milk received from 171 producers in February 1947 and 175 producers in March 1947 was included in the Boston pool and not so included for any other period. Number of producers delivering to this plant apparently omitted from Table 29 on page 22 of petitioner's brief although the volume of milk received from them appears to have been included in Table 11 on page 22 of petitioner's brief.